75

(2)

No. 07-568

FILED
NOV 2 8 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

EXPERIENCE HENDRIX, LLC, et al.,
Petitioners,

v.

THE JAMES MARSHALL HENDRIX FOUNDATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JAMES D. NELSON
Counsel of Record
BRETT W. SOMMERMEYER
BETTS, PATTERSON & MINES, P.S.
ONE CONVENTION PLACE, SUITE 1400
701 PIKE STREET
SEATTLE, WASHINGTON 98101-3927
TEL: (206) 292-9988
FAX: (206) 343-7053

Counsel for Respondent

November 28, 2007

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Are there compelling reasons for this Court to grant review of the Ninth Circuit's decision when there is no direct conflict with a decision of this Court or a federal court of appeals, no departure from the accepted and usual course of judicial proceedings, and the principal basis for Petitioners' challenge to the Ninth Circuit's decision is the alleged misapplication of Washington State law?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 5

I. There Are Not Any Compelling Reasons for Granting the Petition. 5

II. The Ninth Circuit Properly Applied Washington State's Choice of Law Rules. 10

A. The Ninth Circuit Did Not Substitute California Choice of Law Rules for Those of Washington State. 10

B. The WPRA Does Not Contain a Statutory Directive to Apply Washington State Law . 12

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Allapattah Services, Inc. v. Exxon Corp.,
362 F.3d 739 (11th Cir. 2004) 8

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) 20

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 18

Bishop v. Wood,
426 U.S. 341 (1976) 6

BMW of North America, Inc. v. Gore,
517 U.S. 559 (1996) 19

Bridgers v. Texas,
532 U.S. 1034 (2001) 10

Cairns v. Franklin Mint Co.,
292 F.3d 1139 (9th Cir. 2002) 11, 12

Dale v. Ala Acquisitions I, Inc.,
434 F. Supp. 2d 423 (S.D. Miss. 2006) 15

Goldstein v. California,
412 U.S. 546 (1973) 19

Haring v. Prosise,
462 U.S. 306 (1983) 6, 7

In re Gradys Estate,
483 P.2d 114 (Wash. 1971) 11

In re Marriage of Abel,
886 P.2d 1139 (Wash. Ct. App. 1995) . 13, 14, 15

In re Marriage of Oakes,
861 P.2d 1065 (Wash. Ct. App. 1993) 14

Joplin Enter. v. Allen,
795 F. Supp. 349 (W.D. Wash. 1992) 11

Lauritzen v. Larsen,
345 U.S. 571 (1953) 17

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 7

Migra v. Warren City School Dist. Bd. of Educ.,
465 U.S. 75 (1984) 19

N.L.R.B. v. Pittsburgh S.S. Co.,
340 U.S. 498 (1951) 9

Qwest Corp. v. Washington Utilities and Transp. Comn,
166 P.3d 732 (Wash. Ct. App. 2007) 18

Sandberg v. McDonald,
248 U.S. 185 (1918) 15

Stenberg v. Carhart,
530 U.S. 914 (2000) 7

Sun Oil Co. v. Wortman,
486 U.S. 717 (1988) 19

STATUTES AND RULES

Wash. Rev. Code § 26.19.001 (2005) 14

Wash. Rev. Code § 63.60.010 *et seq* (2005). 1

Wash. Rev. Code § 63.60.030 (2005) 2

Wash. Rev. Code § 63.60.030(1) (2005) ..... *passim*

Sup. Ct. R. 10 ..... 5, 6, 7, 20

OTHER AUTHORITIES

Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 (1952) .. 17

William S. Dodge, *Extraterritoriality and Conflict-Of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Intl L.J. 101 (1998) 16

16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4004.1 (2d ed. 1987) 7

Restatement (Second) Conflict of Laws § 6(1) (1971), comment b 15, 16, 18

Restatement (Second) Conflict of Laws § 6(2) (1971), comment c 15

INTRODUCTION

In arguing that this Court should grant their Petition for a Writ of Certiorari, Petitioners Experience Hendrix, L.L.C. and Authentic Hendrix, LLC ("Petitioners") make only a token attempt to comply with this Court's rules governing review of lower court decisions. Specifically, Petitioners claim that the Ninth Circuit disregarded Washington State choice of law rules in contravention of settled law under the decisions of this Court and other federal circuit courts. (Pet. 16.) Petitioners further contend that the Ninth Circuit's alleged erroneous decision interpreting the jurisdictional reach of the Washington Personality Rights Act ("WPRA")[1] represents a "clear departure" from the accepted and usual course of judicial proceedings. (Pet. 17.)

Upon closer examination, Petitioners' challenges to the Ninth Circuit's decision amount to nothing more than claims that the court misapplied a properly stated rule of state law to the facts in this case. Under the rules of this Court and clear precedent construing those rules, Petitioners' asserted grounds for review fail to meet the high threshold for granting a petition. The circumstances under which review may be granted have by necessity been narrowly drawn given the manifest impossibility of reviewing every case in which the lower court is alleged to have been wrong.

In implicit recognition of their inability to present compelling reasons for review, Petitioners devote the

---

[1] Wash. Rev. Code § 63.60.010 *et seq.* (2005).

majority of their petition to an argument on the merits of their claims. While not relevant to this Court's decision on a writ for certiorari, Petitioners' characterization of the Ninth Circuit's choice of law ruling is not accurate. The Ninth Circuit did not, as Petitioners contend, disregard Washington State choice of law rules. To the contrary, the circuit court expressly referenced and applied those rules in reaching its decision. By comparison, Petitioners' suggested expansive reading of the statutory language at issue does not have any basis in Washington State jurisprudence and should be rejected.

STATEMENT OF THE CASE

James Marshall Hendrix ("Jimi") was a famous rock guitarist who died intestate in London, England in 1970. (Pet. App. 2a.) At the time of his death, Jimi was domiciled in New York, and his estate was probated in that state. (Pet. App. 2a.) Jimi's father, James A. Hendrix ("Al"), was Jimi's sole legal heir under New York law. (Pet. App. 2a.) Al assigned all of his rights personally and as sole heir to Jimi's estate to Petitioners. (Pet. App. 2a.) Petitioners claim that the assignment from Al included Jimi's publicity rights, which allegedly consist of the rights to Jimi's name, likeness, image, photographs, and signature. (Pet. App. 2a.)[2]

---

[2] New York law refers to a "right of publicity." The WPRA refers to personality rights. *See* Wash. Rev. Code § 63.60.030. Both refer to the same set of rights. Respondent will refer to both sets of rights as "publicity rights."

In 1995, Al sued his lawyer, Leo Branton, Jr., in the Federal District Court for the Western District of Washington ("District Court") in the case styled *James A. Hendrix v. Leo Branton, Jr., et al.*, No. C93-537Z (W.D. Wash. 1995). (Pet. App. 4a.) The *Branton* case concerned intellectual property rights in Jimi's musical works and the right of publicity. (Pet. App. 4a.) After conducting a thorough conflict of laws analysis, the District Court concluded that New York law governed whether Jimi had a right of publicity at the time of his death, and whether that right, if it existed, descended to Al. (Pet. App. 4a.) The court reached this conclusion on the basis of the general rule followed in Washington State that the law of the state where a decedent is domiciled at death governs whether a property right exists and descends ("domicile rule"). (Pet. App. 5a.)

Although deciding the choice of law issue, the *Branton* court deferred a final ruling on (1) whether, under New York law, the claimed right of publicity existed, and (2) if a publicity right existed, which state's law would govern the infringement claim. (Pet. App. 5a.) The case ultimately settled before trial, and the issue of whether a right of publicity existed and descended under New York law in 1970 was never decided. (Pet. App. 5a.)

In November 2003, Petitioners filed this action against Respondent The James Marshall Hendrix Foundation ("Respondent") in the District Court. (Pet. App. 15a.) Respondent is a non-profit organization founded by Leon Hendrix, Jimi's brother. (Pet. App. 14a.) Respondent's mission is to help the disadvantaged in the inner city, to improve the

environment, and to promote peace. (Pet. App. 2a.) After discovering that Respondent was promoting a charitable event, Petitioners filed this lawsuit against Respondent claiming, among other things, that the use of Jimi's publicity rights violated the WPRA. (Pet. App. 3a & 14a.)

Respondent moved for summary judgment seeking dismissal of the WPRA claim on the ground that Petitioners did not have a claim for infringement of Jimi's right of publicity because, under New York law, no such right survived Jimi's death and descended to Al. Noting that it was being asked to decide the identical choice of law issue raised in the *Branton* case, the District Court again concluded, based on the domicile rule, that "New York law governs whether a right of publicity descended to Al Hendrix." (Pet. App. 5a.) Agreeing with Respondent, the District Court held that New York law did not recognize the existence of post-mortem publicity rights. (Pet. App. 9a.)

Applying Washington State choice of law rules, the District Court further concluded that the WPRA did not apply because (1) the WPRA is not a statutory directive as to choice of law in a publicity rights case, (2) "Washington does not have such a dominant interest . . . that the Court should ignore traditional choice of law principles," and (3) New York has the "most significant relationship" to whether publicity rights existed and descended following the death of a domiciliary of that state. (Pet. App. 10a.) Accordingly, the District Court dismissed Petitioners' WPRA claim. (Pet. App. 11a.)

Petitioners dismissed their remaining claims before the District Court (Pet. App. 34a-35a), and the District Court awarded Respondent's attorney's fees and costs (Pet. App. 28a). Petitioners then appealed the District Court's dismissal of the WPRA claim to the Ninth Circuit Court of Appeals. (Pet. App. 59a-62a.)

The Ninth Circuit issued a memorandum opinion on June 18, 2007 affirming the District Court. (Pet. App. 29a-31a.) In its opinion, the Ninth Circuit held that application of Washington State choice of law principles, including the domicile rule and the "most significant relationship" test, required application of New York law. (Pet. App. 30a.) The Ninth Circuit also found that Respondent was entitled to attorney's fees incurred on appeal. (Pet. App. 32a-33a.)

Following denial of their Petition for Rehearing En Banc (Memorandum Opinion of June 18, 2007), Petitioners filed the subject Petition for a Writ of Certiorari with this Court on October 25, 2007. (Pet. App. 40a.)

REASONS FOR DENYING THE PETITION

I. There Are Not Any Compelling Reasons for Granting the Petition.

United States Supreme Court Rule 10 clearly provides that review is a matter of judicial discretion and will be granted only for "compelling reasons."[3] The rule then elucidates the circumstances under

---

[3] *See* Sup. Ct. R. 10.

which the Court will potentially find this standard to be satisfied, including any decision that directly conflicts with the decision of another circuit court or this Court, is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers, or implicates an important question of federal law that should be settled by this Court.[4] Significantly, Rule 10 concludes with the statement that "*review is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.*"[5]

In addition to applying these general standards, this Court has further restricted the permissible scope of review when the basis is a federal circuit court's allegedly improper determination of state law. Writing for a unanimous court in *Haring v. Prosise*, Justice Marshall highlighted this important limitation on Supreme Court review:

> It is our practice to accept a reasonable construction of state law by the Court of Appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976) . . . "*We emphasize . . . that, standing alone, a challenge to state-law determinations by the Court of Appeals will*

---

[4] *Id.*

[5] *Id.* (emphasis added).

rarely constitute an appropriate subject of this Court's review."[6]

Consistent with this principle, Supreme Court review of a federal circuit court's interpretation and application of state law is reserved for extraordinary cases involving issues with likely widespread, general public impact.[7] Review should, therefore, be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."[8]

Petitioners' specific challenges to the Ninth Circuit's choice of law ruling fail to satisfy any of these standards. Upon closer inspection, Petitioners' argument is that the Ninth Circuit allegedly misapplied Washington State choice of law rules to the particular facts at issue. This argument does not present a proper basis for review under Rule 10 and is directly counter to the deference this Court has

---

[6] *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (emphasis added); *see also Stenberg v. Carhart*, 530 U.S. 914, 917 (2000) (holding that "this Court normally follows lower federal-court interpretations of state law . . . and rarely reviews such an interpretation that is agreed upon by the two lower federal courts").

[7] *See* 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4004.1, at 27 (2d ed. 1987).

[8] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923).

accorded to federal courts of appeals' determinations of state law. Petitioners attempt to clothe their objections to the Ninth Circuit's application of Washington State choice of law rules to the WPRA in the guise of a "conflict" with federal circuit court and Supreme Court precedent. (Pet. 16-17.) But plainly, no such "conflict" exists.

Despite claiming the existence of a reviewable conflict, Petitioners utterly fail to demonstrate a "clear departure from long-settled choice of law principles" in conflict with decisions of other federal circuit courts or this Court. (Pet. 17.) Petitioners have not cited any court of appeals or Supreme Court opinions that have reached an interpretation of a similarly worded statute, on the basis of the same or similar choice of law rules followed in Washington State, that is contrary to the Ninth Circuit's construction of the WPRA. Instead, Petitioners have presented this Court with a false conflict. Petitioners only assert that the Ninth Circuit's purported misapplication of Washington State choice of law rules (by allegedly not fully considering all of the available evidence of legislative intent) amounts to a total disregard of its obligation to follow forum law. Accordingly, Petitioners' assertion does not describe an actual "conflict," much less the kind of reviewable "conflict" contemplated by this Court's rules.[9]

---

[9] Supreme Court review should be limited to direct and substantial conflicts among the federal circuit courts on the same issue. *See Allapattah Services, Inc. v. Exxon Corp.*, 362 F.3d 739, 747 (11th Cir. 2004) ("Because a majority of the federal circuit courts of appeals have addressed this question and failed to come to a consensus -- indeed, they have reached diametrically opposing

Petitioners further claim that the manner in which the Ninth Circuit interpreted the WPRA represents a departure from the accepted and usual course of judicial proceedings. (Pet. 17-18.) As discussed below, Respondent strongly disagrees with Petitioners' characterization of the Ninth Circuit's decision. Again, however, even assuming that the Ninth Circuit misapplied Restatement (Second) Conflict of Laws ("Restatement") section 6(1) (1971) by not looking for evidence of legislative intent in the language of the WPRA itself, such an error would only amount to, at worst, a misapplication of Washington State law to the particular facts at issue in this case. The Supreme Court does not grant review merely to review evidence or inferences that a petitioner suggests should be drawn from that evidence.[10]

Granting review would also run directly counter to this Court's repeated pronouncement that a federal circuit court's interpretation of state law, absent extraordinary circumstances, is rarely reviewed by the Court. Such extraordinary circumstances are conspicuously absent here. Instead, Petitioners seek the resolution of issues that have importance only to the parties, namely whether Jimi's right to publicity

---

views on the issue – the Supreme Court should exercise its certiorari jurisdiction to resolve this circuit split.").

[10] *See N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.").

survived his death and inured to Petitioners' commercial benefit.

Petitioners have not met their burden of showing compelling reasons for granting review of the Ninth Circuit's decision. On this ground alone, Petitioners' request for a writ of certiorari should be denied.

II. The Ninth Circuit Properly Applied Washington State's Choice of Law Rules.

A long standing principle informing this Court's jurisprudence on petitions for certiorari is that the disposition of the petition does not reflect a view concerning the merits of the petitioner's claim.[11] The corollary of this principle is that the Court's focus should be on whether the question(s) presented raise compelling reasons for review, not whether there is any merit to a petitioner's claims. Notwithstanding this fundamental aspect of certiorari, Respondent submits that Petitioners have not shown that there is any merit to their specific challenges to the Ninth Circuit's interpretation and application of Washington State law.

A. The Ninth Circuit Did Not Substitute California Choice of Law Rules for Those of Washington State.

Petitioners first contend that the Ninth Circuit incorrectly applied California choice of law rules in place of those followed by Washington State courts.

---

[11] *See, e.g., Bridgers v. Texas*, 532 U.S. 1034 (2001).

(Pet. 14.) To the contrary, the Ninth Circuit explicitly referenced and followed the "most significant relationship" test, as set forth in Restatement sections 6(1) and 6(2), and the domicile rule derived from Restatement section 260,[12] in affirming the District Court's determination that New York law applied. Both of these concepts inform choice of law determinations under Washington State law.

The Ninth Circuit's citation to *Cairns v. Franklin Mint Co.*[13] did not amount to a substitution of California choice of law rules for those of Washington State. Rather, that analogous decision provided reasonable guidance concerning the interpretation of a publicity rights statute that was similarly worded to the WPRA in a case involving similar claims. The Ninth Circuit's citation to *Cairns* is particularly apt given the absence of any reported Washington authority interpreting the jurisdictional reach of the WPRA or the effect, if any, of general language similar to that employed in the WPRA upon the statute's range of application.

---

[12] Under the domicile rule, Washington State courts apply the law of the decedent's state of domicile at the time of death to determine whether the right to intangible personal property exists and descends. *See Joplin Enter. v. Allen*, 795 F. Supp. 349, 350 (W.D. Wash. 1992); *In re Grady's Estate*, 483 P.2d 114, 115 (Wash. 1971). Jimi was domiciled in New York State at the time of his death in 1970. Accordingly, the Ninth Circuit correctly concluded that New York State law at the time of Jimi's death in 1970 governs whether Jimi had a right of publicity, and whether that right, if it existed, descended to his father Al.

[13] 292 F.3d 1139 (9th Cir. 2002).

Notably, relying upon a plain meaning analysis similar to that followed in Washington State, the *Cairns* court held that the California publicity rights statute did not preempt California's domicile rule, which is simply a codification of the general rule recognized under Washington State law. Thus, the Ninth Circuit reasonably relied upon *Cairns* in connection with its determination that the WPRA is not a statutory directive under Washington State law and that it was, therefore, necessary to apply the Restatement section 6(2) factors and the domicile rule.

B. The WPRA Does Not Contain a Statutory Directive to Apply Washington State Law.

Petitioners' second, related contention is that the Ninth Circuit erred in finding that the WPRA was not a statutory directive within the contemplation of Restatement section 6(1). In particular, Petitioners find this "directive" amidst the general language of Washington Revised Code ("RCW") section 63.60.030(1). (Pet. 15.) This section of the WPRA provides, in relevant part:

> (1) *Every individual or personality*, as the case may be, has a property right in the use of his or her name, voice, signature, photograph, or likeness, and such right shall be freely transferable, assignable, and licensable, in whole or in part, by contract or inter vivos transfer, and shall not expire upon the death of the individual or personality, as the case may be, so protected but shall pass:

> (a) Under the deceased individual's or personality's, as the case may be, last will and testament or, if none, then under the laws of intestate succession applicable to interests in intangible personal property of the individual's or personality's, as the case may be, domicile.[14]

Petitioners' primary argument is that the general language "every individual or personality" demonstrates a legislative intent to apply the WPRA to individuals domiciled outside Washington State. The effect of this extraterritorial application of the WPRA is the recognition of a post-mortem publicity right irrespective of whether the decedent's domicile acknowledges the existence of such a right. (Pet. 11.) Petitioners' strained construction of RCW section 63.60.030(1) is not in accord with Washington State law or with cases in other jurisdictions considering the effect of such general, prefatory statutory language on a choice of law analysis under the Restatement.

As support for their position that this general statutory pronouncement is evidence of a statutory directive, Petitioners rely on *In re Marriage of Abel*.[15] Although finding a statutory directive in the language of a Washington child support statute, the *Marriage of Abel* case is distinguishable on several grounds. First, the language at issue was an affirmative command to the court that the "child support schedule *shall* be

---

[14] Wash. Rev. Code § 63.60.030(1) (2005) (emphasis added).

[15] 886 P.2d 1139, 1141 (Wash. Ct. App. 1995).

applied" in all child support proceedings.[16] This affirmative statement stands in stark contrast to the general, prefatory language, "every individual or personality," used in RCW section 63.60.030(1).[17] Second, that case involved a statutory scheme with a strong basis in Washington State public policy, as reflected in the broad statement of purpose in the statute itself.[18] There is no evidence of any remotely comparable public policy surrounding enactment of the WPRA. Finally, *Marriage of Abel* concerned a former Washington State resident who filed a child support action in Washington State against a Washington State resident. By contrast, there is no such connection here between Washington State and the nonresident (Jimi) whom Petitioners seek to bring within the jurisdictional reach of the WPRA.

Petitioners further contend that the *Marriage of Abel* decision supports a finding that "Washington

---

[16] *Id.* (emphasis in original).

[17] Petitioners have also failed to show that even the use of the word "shall" always signals the presence of a statutory directive. Indeed, while the *Marriage of Abel* court assigned relevance to this word under the specific statute at issue, no other reported Washington decisions have found a statutory directive based on such language despite the existence of countless Washington statutes employing the word "shall."

[18] "The overriding purpose of the child support schedule is to insure that children are protected with adequate, equitable and predictable child support." Wash. Rev. Code § 26.19.001 (2005). As a result, the child support statute enjoys liberal construction to fulfill this overall purpose. *See, e.g., In re Marriage of Oakes*, 861 P.2d 1065, 1067 (Wash. Ct. App. 1993).

follows the analysis set out in comment b [to Restatement section 6(1)]" and that, pursuant to comment b, a statutory directive supercedes other choice of law rules like the domicile rule under Restatement section 260. (Pet. 10.) *Marriage of Abel*, however, neither referenced comment b nor even explicitly addressed the form of analysis a Washington State court should follow in deciding whether there is a statutory directive when the statute is silent as to its range of application. Additionally, no reported Washington State cases have held that a statutory directive supercedes otherwise applicable choice of law rules.

Petitioners' single-minded focus on comment b also ignores comment c to Restatement section 6(2): "Legislatures usually legislate . . . only with the local situation in mind. They rarely give a thought to the extent to which the laws they enact . . . should apply to out-of-state facts."[19] Comment c is in accord with the general presumption against interpreting a statute to have extraterritorial effect.[20] This presumption has been found to be especially strong where, as here, a party argues for the existence of a statutory directive on the basis of general, prefatory language in a statute (*e.g.* "every person" or "every decedent").[21] To find

---

[19] Restatement § 6(2), comment c.

[20] *See, e.g., Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) ("[L]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.").

[21] See *Dale v. Ala Acquisitions I, Inc.*, 434 F. Supp. 2d 423, 432 (S.D. Miss. 2006) (holding that "generic, prefatory language

otherwise would impermissibly give a statute like the WPRA extraterritorial effect by implication. Furthermore, such a reading would preclude the application of the Restatement section 6(2) whenever a statute contained general language that could potentially be interpreted as applying to out-of-state facts. This result could not have been intended by comment b's authors in stating that "the intentions of the statute can *sometimes* be ascertained" from the text of the statute.[22]

The intent of the architects of Restatement 6(1) is actually at odds with Petitioners' proffered expansive interpretation of what constitutes a state statutory directive on choice of law. It was Elliot Cheatham and Willis Reese who first suggested, in 1952, that conflicts questions be resolved through comparative interest balancing, with preference given to the law of the state with the dominant interest.[23] In a widely cited, authoritative law review article published before the Restatement, these two authors expressed their concerns regarding the extraterritorial application of state statutes:

> There is one rule or policy which, wherever applicable, takes precedence over others and, to

---

such as ['in any civil action'] is not considered sufficient to establish a 'statutory directive' on choice of law").

[22] *See* Restatement § 6(1), comment b (emphasis added).

[23] William S. Dodge, *Extraterritoriality and Conflict-Of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l L.J. 101, 119-20 (1998).

> a large extent, saves the courts from further pain of decision. That controlling policy, obvious as it may be, is that a court must follow the dictates of its own legislature to the extent that these are constitutional. But, although choice of law constitutes no exception to this fundamental rule, rarely can the principle be applied in practice. *The vast run of statutes are enacted with only the intrastate situation in mind. The application of a statute to out-of-state occurrences, therefore, must generally be determined in accordance with ordinary conflict of laws rules. And this is so even if, as is frequently the case, the statute employs such sweeping terms as "every contract" or "every decedent." Unless it appears that the draftsmen so intended, language of this sort is not to be taken literally to mean that the statute is applicable to every transaction wherever occurring or to every case brought in the forum.* Where, on the other hand, it is clear that the legislature has actually addressed itself to the choice of law problem, the courts, subject to the limitation of constitutionality, must give effect to its intentions.[24]

This passage highlights a strong presumption favoring application of ordinary conflict of laws principles (*e.g.* Restatement section 260) in the absence of a clearly expressed state legislative intent

---

[24] *Lauritzen v. Larsen*, 345 U.S. 571, 579 n.7 (1953) (quoting Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959, 961 (1952)) (emphasis added).

to the contrary. Petitioners have failed to show such a clear intent in the general language of the WPRA.

Petitioners' argument also runs afoul of both common sense and the well-settled statutory construction principle followed in Washington State that, in undertaking a plain language analysis, a court must remain careful to avoid "unlikely, absurd, or strained" results.[25] Nonetheless, these are precisely the results Petitioners seek by extrapolating from the use of "every individual or personality" in RCW section 63.60.030(1) an implied legislative intent to abrogate the domicile rule and create international legislation *applicable to every person in the world irrespective of any relevant contact with Washington State.*

In their quest to promote an expansive, extraterritorial application of the WPRA, Petitioners advance an unconstitutional construction of the statute. A statute must be construed to avoid not only the conclusion that it is unconstitutional but also grave doubts that it may be unconstitutional.[26] Significantly, Restatement 6(1) prohibits the extraterritorial application of a state statute, even when intended by the state legislature, where, as here, such application is not constitutionally permissible.[27]

---

[25] *Qwest Corp. v. Washington Utilities and Transp. Com'n*, 166 P.3d 732, 735 (Wash. Ct. App. 2007).

[26] *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998).

[27] *See* Restatement § 6(1), comment b.

Petitioners' proposed construction of the WPRA to apply to *all* out-of-state decedent domiciliaries violates the Full Faith and Credit Clause of the United States Constitution. The Faith and Credit Clause applies to matters between states and to matters between a state and the federal government.[28] No single state can usurp Congress's role and impose its own policy choice on neighboring states.[29] State intellectual property laws may stand only so long as they do not prejudice the interests of other states.[30]

Petitioners' interpretation of the WPRA clearly prejudices the interests of New York State by failing to recognize New York Civil Rights Law sections 50 and 51 and the New York State courts' interpretation of these statutes to preclude post-mortem publicity rights. If New York does not wish to recognize a descendible right of publicity in its decedent domiciliaries, a state with little or no contact with Jimi at the time of Jimi's death, like Washington State, cannot legislatively impose such a right without raising insurmountable constitutional concerns.

---

[28] *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-724 (1988) (between states); *see also, Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (between a state and the federal government).

[29] *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996) (commenting that it is clear that no state could "impose its own policy choice on neighboring states").

[30] *See Goldstein v. California*, 412 U.S. 546, 558 (1973) (construing the Dormant Copyright Clause).

Petitioners' construction of the WPRA to apply to *all* out-of-state decedent domiciliaries also violates the Due Process Clause. The restrictions mandated by the Due Process Clause require that for a state's substantive law to be selected in a constitutionally permissible manner, that state must have significant contact or a significant aggregation of contacts, creating sufficient state interests that the choice of its law is neither arbitrary nor fundamentally unfair.[31] As held by the District Court and affirmed by the Ninth Circuit, New York State "clearly has the greater interest in what property rights it chooses to recognize in its domiciliaries." (Pet. App. 10a.) Washington State has no remotely comparable interest and had no significant contact with Jimi at the time of his death. Application of the WPRA to Jimi would, therefore, be arbitrary, fundamentally unfair, and unconstitutional.

CONCLUSION

Petitioners have failed to demonstrate any compelling reasons for this Court to grant their petition for review. The essence of Petitioners' challenge to the Ninth Circuit's choice of law ruling is that the circuit court misapplied Washington State law. Even assuming the truth of this allegation, it does not represent a sufficient basis for review under Supreme Court Rule 10 or this Court's precedent. Additionally, where, as here, there are not any extraordinary circumstances potentially justifying review, the Ninth Circuit's interpretation and construction of state law should be accorded great

---

[31] *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981).

deference. Respondent, therefore, respectfully requests that this Court deny Petitioners' request for review.

Respectfully Submitted,

James D. Nelson, WSBA #11134
Counsel of Record
Brett W. Sommermeyer, WSBA #30003
BETTS, PATTERSON & MINES, P.S.
One Convention Place, Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
Telephone: 206-292-9988
Fax: 206-343-7053
E-mail: jnelson@bpmlaw.com
E-mail: bsommermeyer@bpmlaw.com

Counsel for Respondent
The James Marshall Hendrix Foundation